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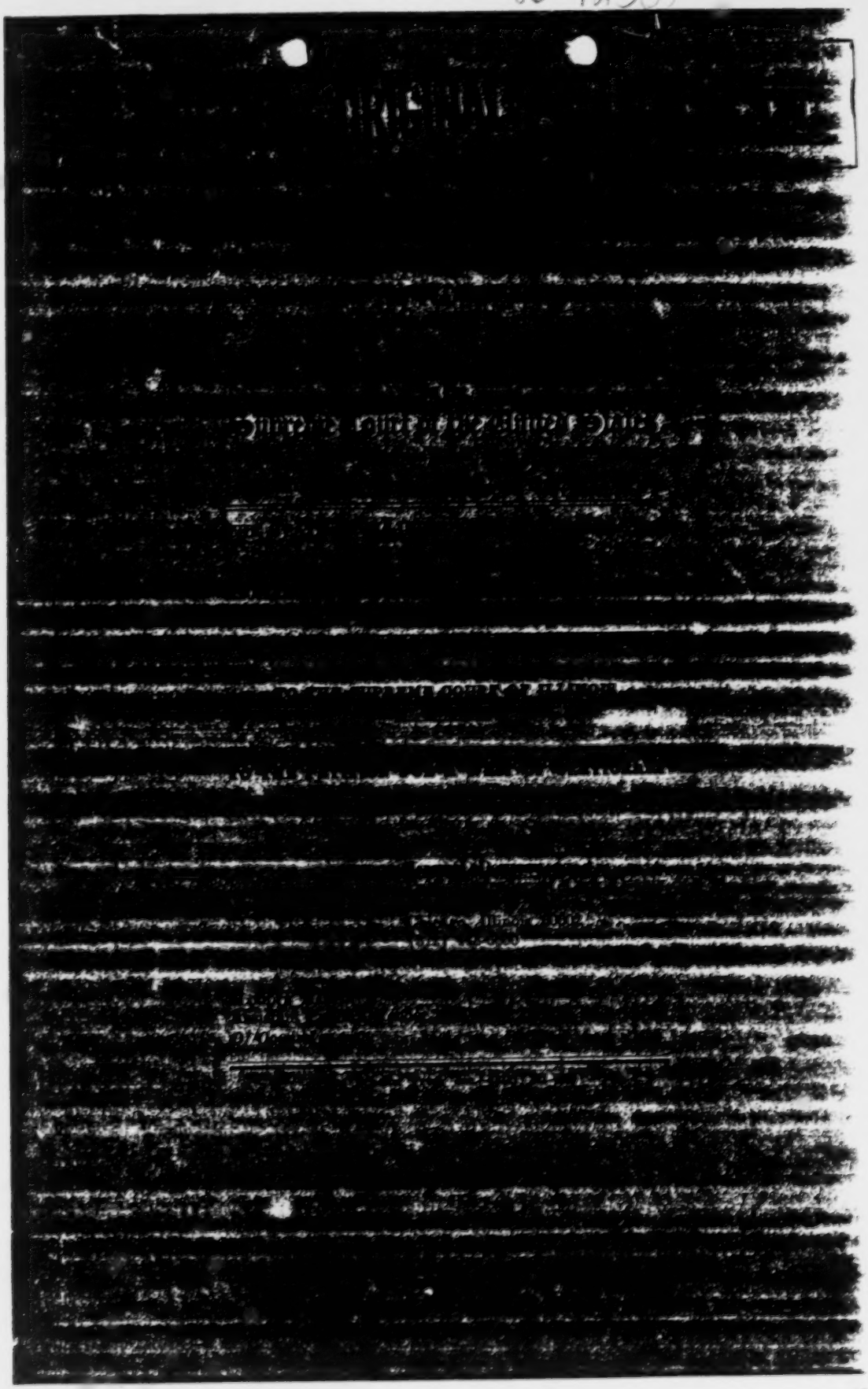

NO. 86-123

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE STATE OF ILLINOIS,

Petitioner,

-vs-

RICHARD STACK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION

---

i.

QUESTION PRESENTED FOR REVIEW

The question presented by petitioner for review is whether this Court's opinion in Wainwright v. Greenfield, 474 U.S. ___, 88 L. Ed. 2d 623 (1986), decided in January of 1986, was properly relied upon by the Illinois Supreme Court in its decision in the instant case, rendered on May 12, 1986, which affirmed the Illinois Appellate Court's holding that introduction of the respondent's invocation of his Fifth Amendment right to silence after receiving Miranda warnings constituted an improper penalty on that right and was prejudicial error at the respondent's trial.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....i

AUTHORITIES CITED.....iii

OPINIONS BELOW.....1

JURISDICTION.....2

STATEMENT OF THE CASE.....2

REASONS FOR DENYING THE WRIT.....4

SINCE THE ILLINOIS APPELLATE COURT AND THE ILLINOIS SUPREME COURT BASED THEIR ORDERS REMANDING THIS CAUSE FOR A NEW TRIAL ON THREE ALTERNATIVE, INDEPENDENT, AND ADEQUATE STATE GROUNDS UNRELATED TO THE FEDERAL ISSUE RAISED BY PETITIONER, THIS COURT'S REVIEW WOULD NOT AFFECT THE OUTCOME OF THE CASE AND WOULD AMOUNT TO NOTHING MORE THAN AN ADVISORY OPINION.....4

CONCLUSION.....7

APPENDIX A.....A-1

APPENDIX B.....B-1

AUTHORITIES CITED

Flournoy v. Wiener, 321 U.S. 253 (1944).....4

Herb v. Pitcairn, 324 U.S. 117 (1945).....4

Michigan v. Long, 463 U.S. 1032 (1983).....4

Uhler v. AFL-CIO, 468 U.S. ___, 82 L. Ed. 2d 896 (1984).....5

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OPINIONS BELOW

The Illinois Appellate Court, First District, First Division, reversed the respondent's convictions and remanded the cause for a new trial in an opinion rendered on November 5, 1984. The opinion of the Appellate Court is reported at 128 Ill. App. 3d 611, 470 N.E. 2d 1252 (1st Dist. 1984), and is attached hereto as Appendix A.

The Illinois Supreme Court affirmed the Appellate Court's decision in an opinion rendered on May 12, 1986. The opinion of the Illinois Supreme Court is reported at 112 Ill. 2d 301, 493 N.E. 2d 339 (1986), and is attached hereto as Appendix B.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1257(3). As discussed in full in the Argument portion of this brief in opposition, this Court's opinion with respect to the one federal issue in the case would have no controlling effect on the outcome of the case because there are also three separate, independent, and adequate state grounds for reversal. Since this Court will not issue mere advisory opinions, the petitioner cannot successfully invoke this Court's jurisdiction.

STATEMENT OF THE CASE

At his jury trial, the respondent presented the defense of insanity through the testimony of five family members, two friends (one of them a police officer), two priests, an emergency room physician, and two court-appointed psychiatrists. This evidence is presented in more detail in the Appellate Court's opinion, attached hereto as Appendix A. Over objections and motions for mistrial, the prosecution was permitted to cross-examine a defense expert and to present rebuttal testimony about the respondent's invocation of his right to silence after receiving Miranda warnings. The prosecutor also argued to the jury that exercise of "one of the most important rights anybody in custody could have" was proof that the defense was feigned. The Illinois Appellate Court, First District, First Division, held that such evidence and comment amounted to an unconstitutional penalty on the respondent's right to silence and were severely prejudicial to the respondent's defense at trial.

In its opinion, the Appellate Court also separately addressed three additional contentions among the ten raised by the respondent. These three additional errors, which the Appellate Court held required reversal of respondent's convictions and remand for a new trial, consisted of (1) the trial court's erro-

neous refusal to permit voir dire of the prospective jurors, pursuant to a state procedural rule promulgated by the state Supreme Court, on the issue of insanity; (2) an evidentiary error consisting of testimony of the prosecution's expert witness which interpreted other testimony and accordingly invaded the province of the jury; and (3) inaccurate and misleading prosecutorial comment, uncorrected by a tendered curative instruction, which erroneously told the jury that the respondent would be released to the streets if acquitted on grounds of insanity.

The prosecution filed a petition for leave to appeal in the Illinois Supreme Court. This petition was allowed, and the case was rebriefed and, in September of 1985, orally argued in the Illinois Supreme Court. Prior to issuance of the Illinois Supreme Court's opinion, this Court announced its unanimous decision in Wainwright v. Greenfield, 474 U.S. ___, 88 L. Ed. 2d 623 (1986). The parties filed further briefs and memoranda in the Illinois Supreme Court as to application of the Greenfield decision. On May 12, 1986, the Illinois Supreme Court unanimously affirmed the order of the Appellate Court reversing the respondent's convictions and remanding the cause for a new trial. The Illinois Supreme Court's unanimous decision rested upon the federal issue presented in Greenfield and the state voir dire issue. Finding that the prosecution had not raised the other two points of error upon which the convictions were reversed by the Appellate Court, the Illinois Supreme Court declined to consider these points and held that they remained law of the case upon retrial. (See Appendix B, at 8.)

REASONS FOR DENYING THE WRIT

SINCE THE APPELLATE COURT AND SUPREME COURT OF ILLINOIS BASED THEIR ORDERS REMANDING THIS CAUSE FOR A NEW TRIAL ON THREE ALTERNATIVE, INDEPENDENT, AND ADEQUATE STATE GROUNDS UNRELATED TO THE FEDERAL ISSUE RAISED BY PETITIONER, THIS COURT'S REVIEW WOULD NOT AFFECT THE OUTCOME OF THE CASE AND WOULD AMOUNT TO NOTHING MORE THAN AN ADVISORY OPINION.

As discussed in the above section devoted to a statement of the case, the reasons given by the Appellate Court for reversing the respondent's convictions and remanding the cause for a new trial consisted of the federal issue identical to that presented in Your Honors' opinion in Wainwright v. Greenfield, 474 U.S. ___, 88 L. Ed. 2d 623 (1986), and three additional state issues having to do with procedures for jury selection, evidentiary rules, and the permissible bounds of prosecutorial argument. Thus, any determination which this Court might make of the federal question would leave unaffected the judgments of the Illinois Appellate and Supreme Courts. The cause will be remanded for a new trial in any event, and this Court's opinion would have no controlling effect on that outcome.

This Court has historically refrained from exercising jurisdiction in cases in which such advisory opinions are sought by the petitioner. Flournoy v. Wiener, 321 U.S. 253, 261-262 (1944); Herb v. Pitcairn, 324 U.S. 117 (1945). Your Honors' recent opinion in Michigan v. Long, 463 U.S. 1032 (1983), is entirely consistent with this tradition. This Court took pains to point out in Long that the requirement of a clear and plain showing by the state court that a decision rests on adequate and independent state grounds "does not in any way authorize the rendering of advisory opinions." 463 U.S. at 1042.

In the instant case, the Illinois courts could hardly have provided a clearer and plainer statement about the adequacy and independence of the state grounds supporting their judgments. The Illinois Appellate Court set forth four entirely distinct sections in its opinion, only one of them federal in nature,

and held that these four reasons required reversal of the respondent's convictions and remand of the cause for a new trial. Appendix A, at 13. In affirming the Appellate Court with respect to this Court's opinion in Wainwright v. Greenfield and the additional state procedural rule regulating voir dire, the Illinois Supreme Court stated:

> The appellate court found additional errors committed at trial and reversed defendant's conviction on those grounds as well. Since the State has raised only two issues on appeal to this court, we need not consider the others; the appellate court rulings on those other matters remain law of the case. Having affirmed the appellate court decision in part on the matters appealed by the State, we remand this cause to the circuit court for further proceedings consistent with this opinion.

Appendix B, at 8.

In view of this procedural history, the clarity of the Illinois courts' statement about the adequacy of state grounds to support their judgments, and the Illinois Supreme Court's conclusion that the prosecution had failed even to seek review of two of those state grounds, it is apparent that this Court could provide nothing more than an advisory opinion. The facts of this case are even clearer than those in the analogous case of Uhler v. AFL-CIO, 468 U.S. ___, 82 L. Ed. 2d 896 (1984), in which Justice Rehnquist denied a stay of the mandate because of this Court's questionable jurisdiction. In Uhler, the California Supreme Court was called upon to determine the legality of a state initiative seeking an amendment of the United States Constitution to require a balanced federal budget. Although the California Supreme Court did decide two federal questions, which Justice Rehnquist described as "important and by no means settled," the state court concluded as well that the proposed initiatives were not proper subjects of the initiative process in California. Justice Rehnquist accordingly denied a stay of the mandate on the ground that a majority of this Court would hold that any decision on the federal questions would

amount to nothing more than an advisory opinion given the independence and adequacy of the state ground. 82 L. Ed. 2d at 897-898.

In Ulster, the Illinois courts have made it abundantly clear in the instant case that their judgments are independently and adequately supported by nonfederal, state grounds. The petitioner's efforts to invoke this Court's jurisdiction are without merit, and the petition for a writ of certiorari must be denied.

CONCLUSION

For all of the reasons stated herein, respondent Richard Stack respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

FIRST DIVISION
November 5, 1984

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

82-1066

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD STACK, Defendant-Appellant.	)))))))	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE JAMES M. BAILEY, JUDGE PRESIDING.

PRESIDING JUSTICE BUCKLEY delivered the opinion of the court:

Following a jury trial, defendant Richard Stack was convicted of the murders of his wife and 13-month-old son. He was sentenced to two concurrent terms of natural life.

On appeal, the issues raised by defendant include: (1) whether the trial court erred in refusing to ask certain voir dire questions designed to ascertain the prospective jurors' attitudes towards the insanity defense; (2) whether the admission of evidence and prosecutorial argument regarding defendant's silence following his Miranda warnings constituted reversible error; (3) whether it was reversible error to allow an expert witness to interpret another witness' testimony; (4) whether defendant was denied a fair trial due to the prosecutor's alleged misstatements regarding the consequences of an acquittal; and (5) whether defendant was proved sane beyond a reasonable doubt. We reverse and remand for a new trial.

The record discloses that on May 11, 1980, defendant murdered his wife by repeatedly kicking her in the head, stabbing her with a pool cue

and then slashing and mutilating her body. After murdering his wife, defendant threw his 13-month-old son against a wall, fracturing the infant's skull. Defendant then repeatedly stabbed the baby with the same pool cue he used in murdering his wife.

Dr. Robert Stein, the Cook County medical examiner, testified that performed autopsies on the bodies of Carol Ann Stack and Richard Stack, Jr. Dr. Stein found nearly 100 stab and slash wounds on the body of Carol Ann. He also found segments of wood, identical to a pool cue, along with other foreign objects within the pleural cavity of her body. Dr. Stein's examination of the infant's body revealed a depressed skull fracture in addition to numerous puncture wounds, contusions and lacerations of the head and chest areas.

Chicago Police Officers William Christopher and Thomas Scott testified that when they arrived at defendant's residence on May 11, 1980, they saw defendant leaning out of a broken window screaming and yelling. Officer Scott testified that defendant was yelling about devils and demons. Both officers said that defendant called out to them, "I have been looking for you. I just killed my wife and baby." At Officer Scott's instruction defendant opened the front door and was handcuffed on the front porch without resistance. Officer Scott testified that defendant was given his Miranda rights and that defendant indicated he understood each right. Defendant was then transported to Holy Cross Hospital for treatment of superficial cuts to his hands and face.

Detective William Foley testified that he spoke with defendant in the emergency room of Holy Cross Hospital. Detective Foley advised defendant of his Miranda rights and then asked defendant why he was at the

hospital. Defendant responded that he was being treated for hand injuries. In response to other questions, defendant stated that he had attended mass twice that day and that following the second mass he began fighting the demons which were coming from his wife and child. Defendant explained that the demons came from his wife because she had not gone to confession. Defendant further stated that there was evil in the world and he was trying to drive the demons out. When asked how he committed the murders, defendant stated that he did not want to say anything about the method he used because the answer was in the Bible. Foley testified that during the interview defendant appeared to be in contact with reality. Foley said that defendant's treating physician, Dr. Jane Caseley, wanted commitment papers signed and that several doctors and nurses were talking about transporting defendant to a psychiatric facility. Foley, however, disagreed and defendant was taken to a lock-up after being released from the hospital.

Mary Bolster, Carol Ann's mother, testified that she saw defendant on May 10, 1980, the night before the murders, and did not notice anything unusual about defendant's behavior that evening. Bolster also said that when she called Carol Ann the afternoon of the murders, defendant answered the telephone and "they conducted a very usual conversation."

Among those testifying for the defense was Dr. Jane Caseley, an emergency room physician at Holy Cross Hospital who treated defendant for cuts to his hands on May 11, 1980. Dr. Caseley stated that the police requested that defendant not be sedated and, thus, no anesthetic was used during the suturing procedure. Caseley recalled that defendant winced once during the suturing but his hands remained still during the remaining procedure. Defendant told Dr. Caseley that his left hand belonged to someone

else. Dr. Caseley further stated that defendant was cooperative in answering questions, but when asked about his medical history he responded that Dr. Caseley and the nurses should ask the Pope. Dr. Caseley also stated that defendant spoke in a low coarse voice of demons. In Dr. Caseley's opinion, defendant was in need of psychiatric care "so she signed commitment papers." At Officer Foley's request, however, defendant was instead taken to a lock-up.

Various relatives and friends of defendant also testified and recounted occasions on which defendant acted unusually. Additionally, Father Robert Lutz, a Chicago priest, described a visit from defendant in which defendant discussed the evil in the world. Following the visit, Father Lutz suggested to defendant's brother-in-law, John Principato, that defendant seek professional help.

Father Joseph Bennett, Cook County jail chaplin, testified that a few days after the offense Father Lutz requested that he visit defendant. Father Bennett stated that defendant told him that he had special powers and was commanded by God to kill his wife and child. Defendant also said that he had used his hands to kill the child and used a perfume bottle to kill his wife. In Father Bennett's opinion, defendant was not in contact with reality.

Dr. Albert Stipes, a psychiatrist employed by the Cook County Court Psychiatric Institute, testified that he examined defendant on June 11, 1980. Stipes stated that defendant exhibited a well organized system of active delusions concerning special powers such as reading backwards and the belief that he was being persecuted by non-Catholics. Defendant described a visual hallucination that he had, prior to committing the murders of an old man turning into a child. Dr. Stipes testified that in evaluating defendant, he considered a report made by Dr. Garvin in which defendant

stated that he had fought with his wife for three hours and had finally killed the demon within her. The report also included the following quote from defendant: "My baby handed me rosary beads in alcohol and I shoved it in her. The baby then changed, too, and came at me and I killed that demon too, beating it."

Dr. Robert Reifman, director of the Cook County Circuit Court Psychiatric Institute, examined defendant on December 18, 1981, and February 1982. Dr. Reifman also reviewed defendant's medical records and the polic report during this period. During the 1981 interview, Dr. Reifman observe that defendant exhibited extremely disoriented thought, agitation, confusion and hyperactivity symptoms attributable to, in Dr. Reifman's opinion, an inappropriate change in antipsychotic medication in the jail. During the examination, defendant told Dr. Reifman that defendant's baby looked like the baby Jesus which was a sign that defendant's wife was possessed by demons. According to Dr. Reifman, defendant committed what defendant believed to be an altruistic act which was necessary to save the world fro demons and devils.

Drs. Stipes and Reifman agreed that defendant suffered from paranoi schizophrenia, experienced a major break with reality and lacked both the substantial capacity to appreciate the criminality of his conduct and the ability to conform his conduct to the requirements of law on the date of the murders. The doctors also agreed that defendant was not lying, feigning illness or malingering.

During the State's rebuttal, Patricia Greco testified that she had known defendant and Carol Ann since grade school. Greco testified as to arguments that defendant had with Carol Ann on four separate occasions in

1976, 1977, and 1979. During the 1977 argument defendant bit off and swallowed the diamond from Carol Ann's engagement ring.

Diane Bolster, Carol Ann's sister, testified that on the day prior to the murders defendant and Carol Ann visited her and during the 45-minute conversation defendant never mentioned religion, demons or devils. On the morning of the murders Bolster visited defendant and Carol Ann and, after offering to watch the baby for Carol Ann, defendant jumped up and said, "No, the baby stays here." Defendant then walked out of the house with the baby saying, "leave me alone, I will do what I want."

Dr. Werner Tuteur, a psychiatrist and chief consultant to the Elgin Mental Health Center, testified on rebuttal that he examined defendant on September 19, 1981, October 6, 1981, and February 17, 1982, and reviewed reports on defendant from the Chester Mental Health Center, the Cook County Circuit Court Psychiatric Institute, and the police. During the interviews defendant said that he had seen the devil come out of his wife's body and that it had laid hands on her. Defendant told Dr. Tuteur that he had one experience with demons the day after the murders but had seen devils and demons before the murders during hangovers. Dr. Tuteur found no evidence of mental disease during the interviews which, in his opinion, indicated that a mental disease never existed. Dr. Tuteur testified that defendant's belief about dying for people's sins were delusions and hallucinations caused by alcohol. Dr. Tuteur disagreed with the diagnoses of defendant as being a paranoid schizophrenic and believed that defendant could have conformed his conduct to the requirements of the law. According to Dr. Tuteur defendant's conduct of screaming to police officers that he had just killed his wife and child indicated that defendant knew the criminality of his actions.

I.

We first address defendant's contention that the trial court erred in refusing to question prospective jurors on the voir dire examination with regard to any bias or prejudice the jurors might have against the insanity defense. Prior to trial, defense counsel submitted the following questions for the trial judge to ask on voir dire:

> "1. Have you or anyone close to you had any experience with a psychiatrist or psychologist?
>
> 2. Do you agree with the concept that a person should not be held responsible for his acts if he is not capable of conforming his conduct to the requirements of the law?
>
> 3. Can you find someone not guilty by reason of insanity?
>
> 4. Do you have any feeling or viewpoint concerning the defense of insanity in a criminal case? If so, what?"

The trial judge agreed to ask the first question, but refused the other three, stating that he would instead ask the prospective jurors if they could follow the law.

The purpose of voir dire examination is to permit counsel to ascertain whether the minds of prospective jurors are free from bias or prejudice. (People v. Witted (1979), 79 Ill. App. 3d 156, 398 N.E.2d 68.) Where insanity is in issue, the parties have a right to examine jurors concerning their attitude on the insanity defense. (People v. Robinson (1981), 102 Ill. App. 3d 884, 429 N.E.2d 1356; People v. Moore (1972), 6 Ill. App.

3d 568, 286 N.E.2d 6.) The manner and scope of voir dire examination lies within the discretion of the trial court. People v. Teague (1982), 108 Ill App. 3d 891, 439 N.E.2d 1066.

In the case at bar, we believe that the trial court abused its discretion concerning the voir dire examination. Although the questions tendered by the defense in this case were designed to probe and discover any potential bias or prejudice regarding the insanity defense, the only question asked pertained to personal experiences with a psychiatrist or psychologist. This question was insufficient to elicit a response concerning the insanity defense. Further, the general questions of whether the jurors could follow the law and whether they could be fair and impartial were also insufficient to cure the error. Such broad inquiries failed to call attention to specific matters which might lead the jurors to display disqualifying attitudes and preoccupations. (United States v. Lewin (7th Cir. 1972) 467 F.2d 1132, 1138.) The trial court therefore erred in refusing to ask the above questions tendered by the defense.

The State argues that any error as to the voir dire was harmless, and cites People v. Pitts (1982), 104 Ill. App. 3d 451, 432 N.E.2d 1062. In Pitts, it was held that no reversible error resulted from the trial court's refusal to examine jurors concerning their attitudes on the insanity defense because there was overwhelming evidence of defendant's sanity. The court in Pitts concluded that the finding of defendant's guilt would not have changed even if the suggested questions had been put to prospective jurors. (104 Ill. App. 3d 451, 457.) This same conclusion cannot be reached in the case before us. Here, both Drs. Stipes and Reifman testified that they examined defendant and agreed that he suffered from paranoid schizophrenia, and lacked both the substantial capacity to appreciate the

criminality of his conduct and the ability to conform his conduct to the requirements of the law at the time of the murders. Both doctors further agreed that defendant was not lying or feigning illness. Additionally, th defense evidence received corroboration from the State's lay witnesses; for instance, both arresting officers told Detective Foley that defendant had been screaming about God, devils and demons before he was taken into custody.

Hence, unlike Pitts, we cannot with certainty conclude in this case that the verdict would not have changed even if the tendered questions had been asked on voir dire. Although we believe that, given the evidence in this case, the error as to this matter was sufficient alone to require the reversal and remand of this cause, our determination is supported by other trial errors discussed below.

II.

We turn next to defendant's argument that it was error to admit evidence and prosecutorial argument concerning his invocation of the right to remain silent. Defendant objects to the admission of testimony elicited from Detective Foley, during the State's rebuttal, that defendant told assistant State's Attorney Bredeman that he chose not to say anything after being advised of his Miranda rights. Defendant also objects to the cross-examination of Dr. Reifman with respect to the psychiatric significance of defendant's invocation of his right to remain silent. Finally, defendant objects to the prosecutor's comment in closing argument that defendant "all of a sudden" exercised his right to remain silent when Dr. Caseley wanted to commit defendant but Detective Foley wanted to retain custody of defendant.

Defendant alleges that the admission of such evidence and argument constituted an intolerable penalty on his exercise of his fifth amendment right against self-incrimination. We agree. Because comment on the exercise of the fifth amendment privilege against self-incrimination diminishes the privilege by making its assertion costly, both due process and the fifth amendment forbid evidentiary use of a defendant's claim of that privilege in the wake of Miranda warnings. (Griffin v. California (1965), 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229.) Such comment is permissible only for the limited purpose of impeaching a defendant who actually makes post-arrest statements contradicting his trial testimony or who falsely testifies to an exculpatory post-arrest statement. (People v. Foster (1980), 81 Ill. App. 3d 915, 926, 401 N.E.2d 1221.) Neither exception applied in the present case.

In the analogous case of People v. Vanda (1982), 111 Ill. App. 3d 551, 444 N.E.2d 609, this court held that the admission of the defendant's post-arrest request for counsel as evidence of the defendant's sanity was error. Our court found very little relevance in the evidence with respect to the defendant's mental state and refused to carve out a special circumstance allowing a penalty on the defendant's exercise of a constitutional right simply because sanity is placed in issue. Such a holding would force the defendant to an intolerable choice between foregoing his constitutional right or bearing the prejudice of having his assertion of the right introduced against him at trial. 111 Ill. App. 3d 551, 563; see also Greenfield v. Wainwright (11th Cir. 1984), 741 F.2d 329.

The foregoing holds true in the instant case. We note the jury was not cautioned to consider the evidence for a limited purpose. Indeed, the trial court repeatedly overruled defense objections, thereby judicially

validating the jury's consideration of the evidence for any substantive pu pose. The evidence was not isolated; it was used to cross-examine defendant's expert witness and during the State's rebuttal. In closing argument the prosecutor emphasized the significance of the evidence:

> "At 5:15, the Assistant State's Attorney comes in. You heard from Foley, you saw the memorandum that Dr. Reifman read. And the State's Attorney says to him--explains him his rights. And what does the defendant say? He says, do I have to answer questions? And the State's Attorney tells him no, you have that right not to. And he says, that's what I want. And the conversation is really important when you consider what was happening at that time. When Dr. Caseley wanted to send him away and Detective Foley wanted to retain responsibility for that man, which was his job, all of a sudden, ladies and gentlemen, while that is going on, the defendant exercises his right to remain silent. One of the most important rights anybody in custody could have. And now you want to tell us that he didn't understand where he was, that he was out of touch with reality on that date?"

The evidence thus improperly served to promote the State's theory that defendant was "feigning" schizophrenia. Given the foregoing facts and circumstances, it is clear that the error as to this matter severely prejudiced defendant.

III.

We next consider defendant's contention that it was error for the State's expert, Dr. Tuteur, to comment upon the testimony of another witness, Peter Bukiri. Bukiri had testified that he and defendant had planned to take their two children somewhere on the date of the offense. During the prosecutor's direct examination of Dr. Tuteur, the following exchange occurred:

> "Q. Doctor, had I informed you of the testimony of a man known as Peter Bukiri in this case, a man who had set out in his testimony he was going to meet the defendant on Mother's Day afternoon with the defendant and his child and he and his child?
>
> A. Yes, it [sic] did.
>
> Q. Did that indicate anything to you, Doctor? to take his little boy to meet this man with his little boy, but his wife didn't like that.
>
> MR. KULL: Objection.
>
> THE COURT: That is what he said? I don't know that you can go into that.
>
> MR. KULL: How does he know that?
>
> THE COURT: I don't know."

Defendant argues that it was for the jury, rather than Dr. Tuteur, to draw whatever inferences existed in Bukiri's testimony. Defendant further asserts that Dr. Tuteur's testimony bolstered the State's motive evidence concerning defendant's marital disputes and was therefore prejudicial. We are in agreement with defendant. The admission of the testimony in questic

improperly invaded the province of the jury and was error. See People v. Linkogle (1977), 54 Ill. App. 3d 830, 368 N.E.2d 1075; People v. Cunningha (1966), 73 Ill. App. 2d 357, 218 N.E.2d 827.

IV.

Defendant also objects to several comments made by the prosecutor during final argument. The prosecutor repeatedly stated that society woul "have to live with" defendant if the jury allowed him to escape responsibility. Defendant maintains that the remarks misled the jury into believing that if he was acquitted for reasons of insanity, he immediately would be returned to society. He contends, therefore, that the remarks were a misstatement of the law and were thus prejudicial.

We find that the remarks complained of were error. Similar comment have been held to be improper. (People v. Wilson (1983), 120 Ill. App. 3d 950, 960, 458 N.E.2d 1081.) We note that no curative instruction was give an instruction tendered by defendant clarifying the correct post-verdict consequences of an acquittal was denied by the court.

V.

Finally, defendant argues that the State failed to rebut beyond a reasonable doubt the evidence that he was legally insane at the time of the murders. After reviewing the record, we believe that whether or not defendant in this case was legally insane presented a question of fact to be resolved by the jury, following a fair and impartial trial.

For the foregoing reasons, we reverse defendant's conviction and remand this cause for a new trial. Given our disposition, we find it unnecessary to address defendant's remaining allegations.

Reversed and remanded.

McGLOON, J., concurs.

JUSTICE CAMPBELL dissenting:

I.

The majority has concluded that the trial court abused its discretion concerning the voir dire examination holding that the trial court erred in refusing to ask the three questions tendered by the defendant. The second question involved a question of law, (People v. Phillips (1981), 99 Ill. App. 3d 362, 425 N.E. 2d 1040), and the third question was argumentative and properly refused. The fourth question was also properly refused and the court was correct in telling the jury that the case involved the insanity defense and asking the jurors whether they could give both sides a fair trial. The manner and scope of voir dire examination lies within the sound discretion of the trial court. (People v. Teague (1982), 108 Ill. App. 3d 891, 439 N.E.2d 1066.) I am not convinced that the court erred in refusing to propound the three questions tendered by the defendant in light of the overwhelming evidence of the defendant's build. See People v. Pitts (1982), 104 Ill. App. 3d 451, 432 N.E.2d 1062.

II.

The majority has also concluded that the admission of evidence and arguments relating to the defendant's invocation of his right to remain silent constitutes an intolerable penalty on defendant's exercise of his Fifth Amendment right against self-incrimination. The State asserts that the prosecutor made the

remark that defendant "all of a sudden" exercised his right to remain silent to support the State's contention that defendant was coherent and aware of his rights immediately following the murders. The State further asserts that defendant did not remain silent following his arrest, but instead gave statements and acted in a manner which was inconsistent with defendant's claim of insanity. The State cites defendant's actions at the time of his arrest, his confession to Detective Foley following the murders, and his extensive statements to defense psychiatrists. Defendant did not remain silent and was in touch with reality, and as such, the prosecutor did not improperly comment on defendant's right to remain silent. The State argues alternatively that, even if defendant did assert his right to remain silent, that evidence was highly probative of defendant's mental state and was needed to rebut evidence of defendant's insanity following the murders.

I agree with the State's position and any error in admitting the evidence was harmless error beyond a reasonable doubt. The cases cited by the majority stand for general propositions of law and are of little help here. See Sulie v. Duckworth (7th Cir., 1982) 689 F2d 128; People v. Spicer (1979), 79 Ill. 2d 173, 402 N.E.2d 169; People v. Wards (1982), 111 Ill. App. 3d 551, 444 N.E. 2d 609.

III.

The majority holds that it was error for the State's expert, Dr. Tuteur, to comment upon the testimony of another witness, Peter Bukiri, a friend of defendant's, who testified regarding

the defendant's conduct on the day before the murders. Following Dr. Tuteur's response, defense counsel objected and the trial judge questioned how Dr. Tuteur could give such an opinion. Defendant argues that it was for the jury, not for Dr. Tuteur, to draw whatever inferences existed in Bukiri's testimony. Defendant further argues that Dr. Tuteur's testimony bolstered the State's motive evidence concerning the defendant's marital disputes and was therefore prejudicial. The State, however, argues that the opinion testimony drew an obvious inference from the evidence adduced at trial and therefore was not prejudicial. (People v. Sprinkle (1979), 74 Ill. App. 3d 456, 393 N.E. 2d 94.) After a review of the record, I find the error, if any, to be harmless in view of the overwhelming evidence of defendant's sanity at the time of the murders. Cf., People v. Ward (1975), 61 Ill. 2d 559, 338 N.E.2d 171.

IV.

Defendant also objects to several comments made by the prosecutor during the final argument. The defendant claims that the remarks misled the jury into believing that if defendant was acquitted for reasons of insanity, he would be immediately returned to society. Defendant therefore maintains that the remarks were a misstatement of the law and thereby prejudicial.

In People v. Greer (1980), 79 Ill. 2d 103, 402 N.E. 2d 203, the Supreme Court did not find that similar comments were reversible error and People v. Wilson (1983), 120 Ill. App. 3d 950, 458 N.E.2d

1081, does not support the conclusion of the majority in the case at bar. In my view, People v. Wilson does not stand for the proposition that the comments of the prosecutor, standing alone, constitute reversible error. Under the facts of People v. Wilson, when a close question was presented on the key issue of the defendant's sanity at the time of the occurrence, other factors peculiar to that case (denial of request for continuances and in quashing subpoenas), prompted the court in granting a new trial.

V.

Finally, the evidence presented in this case was not closely balanced and the errors complained of were not of such a magnitude that the defendant was denied a fair and impartial trial. The record and the evidence presented supports the finding of guilty as the State has met its burden in this case. I do not agree with the majority that the errors complained of constitute reversible error and I would affirm the conviction.

APPENDIX B

Docket No. 61166—Agenda 6—September 1985.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. RICHARD STACK, Appellee.

JUSTICE SIMON delivered the opinion of the court:

Is a defendant entitled to a new trial because the State responded to his insanity defense by introducing evidence, over objection, that the defendant exercised his right against self-incrimination after being given the *Miranda* warnings?

Sometime during the afternoon of May 11, 1980, Richard Stack killed his wife and infant son. Defendant admitted the killings but claimed he was insane at the time. A jury in the circuit court of Cook County rejected that defense and found Stack guilty on both counts of murder; he was sentenced to concurrent life terms for each offense. On appeal, defendant's convictions were reversed (126 Ill. App. 3d 611), and we granted the State's petition for leave to appeal in accordance with Supreme Court Rule 315 (94 Ill. 2d R. 315).

The State contends that the appellate court erred in finding that prosecutors denied the defendant a fair trial by commenting on his exercise of the right to remain silent. After the defendant was arrested, he was taken to a hospital by the arresting officers for treatment of injuries sustained during the homicides. Defendant introduced evidence at trial that he made bizarre, disconnected statements to doctors and hospital personnel. In response, the State elicited the following testimony regarding defendant's conversation with an assistant state's attorney:

"Q. [Assistant State's Attorney]: Now, you said that Mr. Stack couldn't perceive reality on that day. Does it indicate in this document, doctor, that Mr. Bredeman, the state's attorney, went to the hospital and informed Stack of his right, pursuant to Mirando [*sic*], to each one he asked him if he understood and he replied he did. When he finished informing him of his rights, Richard Stack asked what would happen if he chose to remain silent. 'I told him I wouldn't ask him any questions.' And [*sic*] said that is what he wanted.

MR. KULL [defense attorney]: Objection.

***

MR. KULL: Well, Judge, can I have a sidebar?

THE COURT: No, overruled.

MR. KULL: I make a motion for a mistrial.

THE COURT: Denied. Come on, let's go."

And later:

> "Q. [Assistant State's Attorney] What did Mr. Stack say to Mr. Bredeman, tell the ladies and gentlemen of the jury?
>
> A. [Detective Foley] Mr. Stack asked Mr. Bredeman what would happen if he chose not to say anything to Mr. Bredeman, to which Mr. Bredeman said I won't ask you any questions. Mr. Stack then said that's the way he wanted it. And the interview was stopped—
>
> MR. KULL: Objection.
>
> THE COURT: Overruled."

The defendant objects to this evidence as an unconstitutional burden on his exercise of the *Miranda* rights. Although the State acknowledges that it may not comment on defendant's silence so as to draw an inference of guilt (*Doyle v. Ohio* (1976), 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240; *Griffin v. California* (1965), 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229), it argues here that the behavioral component of defendant's lucid response to the *Miranda* warnings is admissible to rebut an insanity defense.

In *Doyle*, the court overturned defendants' convictions because of prosecutorial comments regarding defendants' exercise of *Miranda* rights. That decision turns on the fundamental unfairness of penalizing a defendant for accepting a course of action which the State has invited and the inherent ambiguity in a defendant's decision to remain silent (he might simply be adopting the State's advice). The State argues that these concerns are not implicated in this case.

Contrary to the State's assertions, Richard Stack was clearly penalized for having responded to the *Miranda* warnings. Had he not responded, the interrogation could have continued, although any statement made by the defendant would have been inadmissible without proof that he had understood the right to remain silent and had waived that right. (*Tague v. Louisiana* (1980), 444 U.S. 469, 62 L. Ed. 2d 622, 100 S. Ct. 652.) Since, in view of *Tague*, a defendant can end interrogation only by making an overt response, exercise of the right is clearly penalized if the State can use such a response to establish defendant's lucidity and, therefore, his culpability. For this reason, the use of defendant's *Miranda* response "cuts down on the privilege by making its assertion costly" and is violative of the fourteenth amendment. *Griffin v. California* (1965), 380 U.S. 609, 614, 14 L. Ed.

2d 106, 110, 85 S. Ct. 1229, 1233.

The defendant's trial did not comport with the requirements of due process because it is fundamentally unfair for the government to suggest this course of action and then use defendant's acceptance to prove his sanity. (*State v. Burwick* (Fla. 1983), 442 So. 2d 944.) *Miranda* warnings carry an implied promise that exercise of the right to remain silent will not be used against the defendant (*Doyle v. Ohio* (1976), 426 U.S. 610, 618, 49 L. Ed. 2d 91, 98, 96 S. Ct. 2240, 2245); the State may not exploit the recital of *Miranda* warnings to sing the Siren's song and lure a defendant into creating evidence against himself. In *Wainwright v. Greenfield* (1986), 474 U.S. ___, 88 L. Ed. 2d 623, 106 S. Ct. 634, decided while this case was under advisement in this court, the United States Supreme Court faced the very issue we now confront, and the court determined that it is fundamentally unfair for the prosecution to breach the State's implied promise by using post-*Miranda* silence, including statements of intent to remain silent (474 U.S. ___, ___ n.13, 88 L. Ed. 2d 623, 632 n.13, 106 S. Ct. 634, 640-41 n.13), as evidence of the defendant's sanity.

We are urged by the State not to apply *Greenfield* "retroactively" to this case because it was an unforeseeable extension of *Doyle* (although *Doyle* itself applies retroactively to cases on direct appeal (*Phelps v. Duckworth* (7th Cir. 1985), 757 F.2d 811)) and because it will prejudice the State's case to be forced to retry the defendant's culpability four years after the original trial (*Solem v. Stumes* (1984), 465 U.S. 638, 79 L. Ed. 2d 579, 104 S. Ct. 1338). How the State could appeal from an adverse ruling in the appellate court and then argue that inevitable delays in the appeal process have so prejudiced its case as to require reversal of the appellate court decision is difficult to understand. Furthermore, we do not agree with the State's characterization of *Greenfield* as an unexpected extension of *Doyle*; the court did no more in *Greenfield* than apply the rules set forth in its previous opinions.

> "The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those

his will not be penalized. In both situations the State ...en seeks to make use of the defendant's exercise of those rights in obtaining his conviction. *The implicit promise, the breach, and the consequent penalty are identical in both situations.*" (Emphasis added.) *Wainwright v. Greenfield* (1986), 474 U.S. ___, ___, 88 L. Ed. 2d 623, 630-31, 106 S. Ct. 634, 639.

Greenfield merely fleshes out the *Doyle* rule and applies it where necessary to avoid a fundamentally unfair trial. *Solem v. Stumes* (1984), 465 U.S. 638, 79 L. Ed. 2d 579, 104 S. Ct. 1338, cited by the State, is inapposite. In *Solem* the court determined that the *per se* rule of *Edwards v. Arizona* (1981), 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880, did not apply to cases on collateral review. Unlike *Greenfield*, *Edwards* merely adopts a prophylactic rule to prevent certain *Miranda* violations; "*Edwards* did not confer a substantive constitutional right." (*Solem v. Stumes* (1984), 465 U.S. 638, 644 n.4, 79 L. Ed. 2d 579, 588 n.4, 104 S. Ct. 1338, 1342 n.4.) But *Greenfield* applies a recognized substantive right which shows that the defendant in this case did not receive the fair trial to which he was entitled. Since *Greenfield* simply applies "settled precedents to new and different fact situations," there is no question but that it governs this case. *United States v. Johnson* (1982), 457 U.S. 537, 549, 73 L. Ed. 2d 202, 213, 102 S. Ct. 2579, 2586; *see Shea v. Louisiana* (1985), 470 U.S. ___, 84 L. Ed. 2d 38, 105 S. Ct. 1065 (reasoning of *Johnson* applies to fifth amendment cases, so *Edwards v. Arizona* retroactively governs cases on direct review).

Prior to the court's decision in *Greenfield*, the State had not argued for reversal of the appellate court's decision on the ground that it was an erroneous application of retroactive law; indeed, the State could not have argued retroactivity since the case was before the appellate court on direct appeal. The common law rule for both civil and criminal cases requires legal rulings to "be given effect while a case is on direct review" (*Linkletter v. Walker* (1965), 381 U.S. 618, 627, 14 L. Ed. 2d 601, 607, 85 S. Ct. 1731, 1736). Now that the supreme arbiter of Federal constitutional law (see *Atkins v. Atkins* (1944), 386 Ill. 345, 347) has agreed with the conclusion reached by our appellate court in this case, the State asks this court to reverse the appellate court's decision, not despite the Supreme Court's endorsement, but because of that en-

dorsement. There is no logic in the State's position that an appellate court opinion we know to be correct as a matter of law, and which we would otherwise affirm, must now be reversed because, during the pendency of this appeal, the United States Supreme Court has agreed with a legal doctrine announced by our appellate court. *Wainwright v. Greenfield* (1986), 474 U.S. ___, ___ n.14, 88 L. Ed. 2d 623, 632-34 n.14, 106 S. Ct. 634, 641-42 n.14.

The State argues that introduction of the defendant's response is proper to show that, contrary to evidence of defendant's bizarre behavior on the afternoon in question, he was lucid and in touch with reality within moments after displaying such behavior. Hoping to distinguish *Greenfield*, the State claims that the defendant's decision to invoke his *Miranda* rights "was not of particular interest," and that the State must be allowed to admit the statement because the defendant "provided no other conversational evidence of contact with reality."

We are unfamiliar with any rule of constitutional law allowing the State to deprive an individual of his fundamental rights because the State cannot otherwise obtain a conviction. Such a precedent would raze the foundation of American criminal procedure, and we reject the State's argument because it totally fails to distinguish *Greenfield* on any persuasive basis. Additionally, we question the probative value of this evidence. "Insanity is not the equivalent of stupidity." (*Commonwealth v. Mahdi* (1983), 388 Mass. 679, 695, 448 N.E.2d 704, 713; see M. Bleuher *The Schizophrenic Disorders* 496 (1978).) But *Greenfield* is dispositive in this case, so we need not address the ambiguity inherent in a defendant's exercise of his *Miranda* rights. We agree with the appellate court on this issue and conclude that the defendant is entitled to a new trial.

The appellate court also reversed the circuit court on the ground that the trial judge erred in refusing to ask the members of the venire, as requested by the defendant, whether they could return a verdict of not guilty by reason of insanity provided the evidence established that the defendant was insane at the time he killed his wife and son. Although we have already determined that the violation of defendant's fifth amendment rights requires a new trial, we consider this issue argued by the State in its appeal as it may arise again at a second trial. The State argues that the trial court properly refused to tender defendant's *voir dire* questions regarding the insanity de-

fense. Four such questions were submitted by defense counsel:

"1. Have you or anyone close to you had any experience with a psychiatrist or psychologist?

2. Do you agree with the concept that a person should not be held responsible for his acts if he is not capable of conforming his conduct to the requirements of the law?

3. Can you find someone not guilty by reason of insanity?

4. Do you have any feeling or viewpoint concerning the defense of insanity in a criminal case? If so, what?"

Only the first question was propounded by the judge because, he said, the others were argumentative and presupposed knowledge of how the insanity defense is legally defined in Illinois.

In reversing the circuit court, the appellate court held that refusal to ask defendant's tendered insanity questions constituted an abuse of discretion. The State argues in this court that refusal to ask the last three questions was properly within the trial court's discretion. We agree that the second and third questions are vague and improperly phrased and their rejection can be upheld for that reason. The fourth question was proper, however, and should have been put to the prospective jurors.

The State contends, on the basis of Supreme Court Rules 431 and 234 (87 Ill. 2d R. 431; 94 Ill. 2d R. 234), that the appellate court reached the wrong result with respect to all three questions. It argues that those rules prohibit inquiry into matters of law during *voir dire*. Rule 234, made applicable to criminal cases by Rule 431, provides in part: "Questions shall not directly or indirectly concern matters of law or instructions."

Rule 234 was promulgated to shorten *voir dire* by eliminating that portion of the process which did not advance the legitimate ends of impaneling an impartial jury. The rule is aimed at this specific evil since "no reason is perceived for questioning [prospective jurors] as to legal principles or concepts beyond ascertaining whether or not they are willing to accept and follow the instructions concerning the *law of the case*." (Emphasis added.) (*People v. Lobb* (1959), 17 Ill. 2d 287, 302.) The fourth question does not violate Rule 234 because it seeks to determine only whether the prospective juror would be biased against an insanity defense. Since the question does not attempt to state the law but merely probes for bias, it cannot be

faulted for containing argumentative and misleading statements of law, the abusive practice put to rest by the rule.

The State argues that the question is deficient in failing to set forth the precise legal test of insanity concerning which prospective jurors could express a viewpoint, but setting forth the law during *voir dire* is exactly the practice proscribed. The State also argues that jurors would not be able to answer intelligently any of the questions rejected by the trial judge because they would not know the law of insanity until instructed at the close of trial. That proposition proves too much: the State does not contend that it is improper to ask the venire members whether they will follow the law as instructed (indeed, the State says such examination is appropriate) even though they have not at the time of *voir dire* been instructed on any law whatsoever.

In *People v. Wright* (1985), 111 Ill. 2d 128, prospective jurors were asked whether they could impose the death penalty in an appropriate capital case. A majority of this court found such *voir dire* unexceptionable under Rule 234, saying that "the State, in its attempt to discern the potential jurors' attitudes to the death penalty inquired if they would be able to impose the death penalty if such a sentence was supported by the law and facts. We find such questioning appropriate ***." (111 Ill. 2d 128, 158-59.) Similarly, attorneys have been allowed in dramshop actions to ask prospective jurors whether they disagreed with the dramshop statute. (*Schneider v. Kirk* (1967), 83 Ill. App. 2d 170.) The thread which runs through those cases is that the jury was going to be asked to apply an extraordinarily controversial legal requirement against which many members of the community may have been prejudiced. Inquiry into the feeling or viewpoint of the venire regarding such controversial legal propositions is consistent with a *bona fide* examination conducted so that the parties can intelligently exercise their prerogatives to challenge. Furthermore, a defendant's sixth and fourteenth amendment rights to an impartial jury (U.S. Const., amends. VI, XIV) are diminished when jurors are prejudiced against an appropriate verdict of not guilty by reason of insanity.

The State argues that the trial judge's refusal to pose the fourth question was not erroneous because sufficient inquiry was made of the venire's willingness to apply the

law as instructed by him, and the defendant was entitled to no more. Even if *voir dire* had explored that question, an assertion which the record belies, we would still find an abuse of discretion. Although the insanity defense upon which the defendant relied is a well-recognized legal defense, it remains a subject of intense controversy. In *People v. Bowel* (1986), 111 Ill. 2d 58, 65, we described insanity as "a defense which is known to be subject to bias or prejudice." A defendant's right to an impartial jury is not, therefore, protected where the sole inquiry into whether jurors will abide by the law allowing that controversial defense is the far broader and all-embracing question which the State contends was propounded in this case, namely, whether the jurors would follow the court's instructions on the law.

Just as the State is allowed to probe the venire for jurors who would not follow the law of capital punishment, the defendant should be allowed to identify and challenge those prospective jurors who would refuse to follow the statutory law of the insanity defense. As noted by the appellate court, "parties have the right to have jurors examined concerning their attitudes toward the insanity defense when such is involved in a case." *People v. Robinson* (1981), 102 Ill. App. 3d 884, 891; *People v. Witted* (1979), 79 Ill. App. 3d 156; see *United States v. Allsup* (9th Cir. 1977), 566 F.2d 68; *Washington v. State* (Fla. App. 1979), 371 So. 2d 1108; *State v. Olson* (1971), 156 Mont. 338, 480 P.2d 822; *State v. Sanders* (1978), 161 W. Va. 399, 242 S.E.2d 554.

The appellate court found additional errors committed at trial and reversed defendant's conviction on those grounds as well. Since the State has raised only two issues on appeal to this court, we need not consider the others; the appellate court rulings on those other matters remain the law of the case. Having affirmed the appellate court decision in part on the matters appealed by the State, we remand this cause to the circuit court for further proceedings consistent with this opinion.

Affirmed and remanded.